

IN THE IOWA DISTRICT COURT IN AND FOR MAHASKA COUNTY

STATE OF IOWA,

Plaintiff,

vs.

HENRY W. VANWEELDEN,

Defendant.

No. FECR063130

RULING

FILED
12 MAY 18 AM 11:02
CLERK OF DISTRICT COURT
MAHASKA COUNTY, IOWA

Hearing on Defendant's Combined Motion for a New Trial and/or Motion in Arrest of Judgment was held on April 16, 2012. Defendant, Henry VanWeelden, was personally present with his attorney, Matt Moore. The State of Iowa was represented by Assistant Iowa Attorney General Becky Goettsch. Defendant's Motion for a New Trial is filed pursuant to Iowa Rules of Criminal Procedure 2.24(2)(b)(6), 2.24(2)(b)(8) and 2.24(2)(b)(9) and his Motion in Arrest of Judgment pursuant to Iowa Rule of Criminal Procedure 2.24(3).

In these Motions, Defendant contends that: (1) the State of Iowa violated the rule excluding witnesses from trial proceedings and, in fact, there was actual witness collusion among State witnesses; (2) newly discovered evidence exists which is material and would likely change the outcome at trial; and (3) prosecutorial misconduct caused prejudice to Defendant and prevented a fair trial. Finally, Defendant alleges that based upon the totality of the circumstances, he was deprived of due process and denied a fair trial.

Testimony was taken and Defendant offered and the Court received exhibits. Counsel for both parties argued their respective positions. I have reviewed Defendant's exhibits and affidavits. I have considered the parties' written filings. I have watched Defendant's Exhibit D – a DVD of the Board of Mahaska County Supervisors April 6, 2009, meeting. In addition, I have reviewed portions of the trial testimony – specifically, the trial testimony of State witnesses, Greg Gordy and Lawrence Rouw.

I will first consider Defendant's contention that newly discovered evidence requires this Court to grant his Motion for a New Trial and/or Motion in Arrest of Judgment.

Defendant was charged in a three-count Trial Information with the crimes of: Count I, Theft In The First Degree; Count II, Misconduct In Office; and Count III, Tampering With Records and convicted by jury verdict of all three counts following a week-long trial.

The dispute that resulted in the filing of these criminal charges arose after Defendant was re-elected to the Board of Supervisors in the November 2008 election. At the time of his re-election, Defendant's wife was not covered under his county-sponsored health insurance plan.

The State contended that Defendant improperly added his wife as a dependent to the county's health insurance plan, and that his actions in doing so constituted the three crimes charged.

Defendant authored a letter on January 16, 2009, to the county's health insurance administrator indicating that "the board of supervisors is in agreement Bonnie VanWeelden should be places [sic] on the county insurance starting February 1" (State's Exhibit 11).

Defendant at all times relevant to this case was a Mahaska County Supervisor as were the two main State witnesses, Greg Gordy and Lawrence Rouw.

The essence of Defendant's new evidence claim is that following the conclusion of the trial and Defendant's conviction, he subsequently discovered a videotape of the April 6, 2009, Mahaska County Board of Supervisors meeting. Defendant contends that the discovery of this videotaped meeting satisfies the legal requirement of the new evidence rule, and that I should set aside the guilty verdicts and/or order a new trial. Defendant argues that the contents of the videotaped meeting (regarding adding Bonnie Vanweelden to the county's health insurance plan) severely contradicts the testimony of State witnesses Rouw and Gordy, is material new evidence and would likely change the outcome of the trial had it been presented to the jury.

Iowa Rule of Criminal Procedure 2.24(2)(b)(8) states in applicable part, "The court may grant a new trial for any or all of the following causes: . . . when the defendant has discovered important and material evidence in the defendant's favor since the verdict, which the defendant could not with reasonable diligence have discovered and produced at the trial. . . ."

A trial court's discretion in granting or denying a motion for new trial is "**unusually broad**" when the new trial motion is grounded on newly discovered evidence. *State v. Weaver*, 505 N.W.2d 240, 245 (Iowa 1996).

The Iowa Supreme Court has held that this broad discretion is particularly appropriate in newly discovered evidence claims because a trial judge is in a better position to distinguish between unavoidable legitimate claims and those proposed in desperation by a disappointed litigant. In order to prevail on such a motion, the defendant must show that the evidence: (1) was discovered after the verdict; (2) could not have been discovered earlier in the exercise of due diligence; (3) is material to the

issues in the case and not merely cumulative or impeaching; (4) and probably would have changed the result of the trial. *State v. Jefferson*, 545 N.W.2d 248, 249 (Iowa 1996) and *State v. Romeo*, 542 NW2d 543 (Iowa 1996).

I was the trial judge for this week-long trial. I closely observed the witnesses' testimony and demeanor. State witnesses Rouw and Gordy were constantly evasive and, at times, refused to directly answer simple questions.

I do not consider the Defendant's new evidence claim to be a desperation argument by a disappointed litigant.

The fighting issue in this case was whether the board of supervisors agreed to add Bonnie VanWeelden as a dependent to Defendant's health insurance coverage with the county plan. In this regard, a new employee is allowed to add dependents to their health insurance plan within 30 days of beginning employment without meeting underwriting requirements.

Defendant contended that Supervisor Rouw agreed with him that re-elected meant newly elected (new employee) for the purposes of adding dependents to the health insurance plan. Much of the trial testimony centered on the plan documents and interpretation.

Regarding the elements of newly discovered evidence:

(1) It is clear that the DVD of the April 6, 2009, Mahaska County Board of Supervisors' meeting was not located until after the trial.

(2) I have considered Defendant's Exhibits B and C. Defendant's Exhibit C, the Affidavit of Defendant, Henry VanWeelden, establishes that Defendant was aware that some of the supervisors' meetings were videotaped by Communications Research Institute (CRI), and that he unsuccessfully attempted, prior to trial, to locate a DVD of the April 6, 2009, meeting.

Defendant's Exhibit B, the Affidavit of Sam Looney, establishes that he is employed by CRI, which videos Mahaska County Board of Supervisors' meetings. Following trial in this case, he was contacted by Defendant's attorney Matt Moore and asked to search the archives for the April 6, 2009, Mahaska County Board of Supervisors' meeting. Looney could not locate such a recording at first, but then found that the DVD which recorded the April 6, 2009, meeting had been mismarked as the April 6, 2008, meeting.

I have considered the cases cited by both parties on the due diligence issue. The State contends that Defendant could have discovered this DVD with due diligence. I

agree with Defendant that his attempt to locate the DVD and the subsequent circumstances establishing that the DVD was mislabeled satisfies the due diligence requirement.

(3) The third requirement is that the newly discovered evidence be material and not merely cumulative or impeaching.

Rouw testified at trial as follows (excerpts from trial transcript testimony):

(A) Q. Okay. And in -- as a board of supervisor, how did you interpret newly elected? Did that include re-elected?

A. **It does not include re-elected in my mind.**

Q. Okay. And is that how you interpreted the plan while you were a board of supervisor?

A. Yes.

(B) Q. At some point in 2008 or 2009, did it come to your attention that Mr. VanWeelden wanted to add his wife, Bonnie, to the Mahaska County insurance?

A. Yes.

Q. How did that come to your attention?

A. **Mr. VanWeelden mentioned it when him and I were in the supervisors' office first part of January of '09.**

Q. **And you said it was the first part of January of '09. Do you know what date it was?**

A. **Not exactly, first half of the month, I know that.**

(C) Q. Where -- where were you at when Mr. VanWeelden approached you about this issue?

A. Sitting at my desk in the supervisors' office.

Q. What did Mr. VanWeelden say to you?

A. He said he'd like to put his wife on the plan.

Q. Did he ask you a question about it or was it a statement?

A. I don't recall exactly whether it was a question or a statement.

Q. What did you -- what was your response to him?

A. If you want to put her on the plan, she'll have to go on the 12-month waiting period.

Q. Did you know at that time that Mrs. VanWeelden was not on the insurance?

A. Yes.

Q. Did you also know at that time that Mr. VanWeelden was not a new employee or newly elected?

A. Yes.

(D) Q. And now, to your knowledge, was Mr. VanWeelden re-elected in the November of '08 election?

A. Yes.

Q. The conversation with him that you had in January of '09, was this after he was re-elected?

A. Yes.

Q. Did you still tell him that she needed to -- that she would have the 12-month waiting period?

A. Yes.

Q. And why was that?

A. A re-elected official is not the same as newly elected or a new employee. It's a continued employee.

(E) Q. And let's talk a little bit about the content of this letter. The first line of it says, The board of supervisors is in agreement Bonnie VanWeelden should be placed on the county insurance starting February 1st. Is that an accurate statement?

A. That's a false statement.

Q. Why is that?

A. There was no agreement to do that.

Q. And the second line is, The basis for this is that newly elected officials are automatically enrolled, along with their families -- along with their family. Is that accurate?

A. That's not my understanding of the insurance plan.

Q. And is -- and, in fact, is that what you had told Mr. VanWeelden?

A. That's correct.

Q. The third line says, Since I was just re-elected, this should cover us if anyone has a problem with this. Is that accurate?

A. No. He was just re-elected, but it doesn't cover the problem.

Q. And did he ever ask or get your approval, either formally or informally, to make that statement?

A. No.

Q. Did you have any intentions of ever approving such an amendment?

A. No.

Q. And why not?

A. Added cost to the plan. And once you start making -- other elected officials would want the same privileges, and so you would have to change the plan, in my mind, completely if you were going to change it for some.

Q. Was this issue ever placed on the agenda or the minutes for a formal vote or discussion?

A. Not that I can recall.

(F) Q. Mr. Rouw, right before we took the break, I was asking you to show me where in either of the policies, the policies discussed anything about newly elected versus re-elected officials. Do you remember that question?

A. Yes.

Q. And then during the break, you met with the State's attorneys, and did they show you something?

A. They showed me on the eligibility, but it does not say elected or re-elected. It says new employees.

Q. And I'll represent to you, Mr. Rouw, that I've been through both of those policies page by page, as have other people, and there isn't anything in those documents that discusses newly elected or re-elected and what or how eligibility was affected. Do you have any reason to disagree with me?

A. The words newly elected and re-elected I do not believe are in the policy.

Q. Okay. That's important, isn't it? It's important in this case, those two words?

A. Could be -- is.

Q. Those two words -- wait. Those two words are important in this case, aren't they?

A. Yes.

Q. Now, you made the statement -- and I want to make sure that I have this right, to make sure I get it exactly right. You made the statement now twice that you went to Greg Gordy with the January 16, 2009, letter, to ask Greg if he had approved it. Do you recall that?

A. Yes. That's not exactly correct, but, yes.

Q. You tell me how -- you make it exactly correct for us.

A. We were both in the supervisors' office. He handed it to me. We were a step or two apart. I looked at it and asked him, Did you approve this letter?

Q. And then your testimony was you asked him that because if he would have agreed to it, it would have represented a majority, and it would have been okay; is that correct?

A. It would have been a majority, yes.

(G) Q. Now, I just have two more questions, I think. You agree with me that you and Willie VanWeelden had a conversation about Bonnie being added to the Mahaska County health insurance plan in early January 2009. We can agree there was a conversation?

A. Yes.

Q. Okay. Now, we apparently -- we can even agree that the conversation -- we can even agree that the conversation was about whether and how she could be added to the Mahaska County insurance plan; correct?

A. Yes.

Q. Now, I want to know where we disagree. Is it we disagree that you told Willie that day that you agreed with him that she could come on because he had just been or was starting a new term as a Mahaska County supervisor on January 1st, 2009?

A. I did not agree to that.

Q. Do you remember specifically what you stated or discussed beyond what you and I have agreed to?

A. Willie was a re-elected official, which means he's a continued employee, and in my opinion, that means it's a late enrollee.

One topic listed on the agenda for the April 6, 2009, Mahaska County Board of Supervisors' meeting was "Health Insurance Addendum" (Defendant's Exhibit L).

Defendant's Exhibit D, the DVD of the April 6, 2009, Mahaska County Board of Supervisors' meeting with Rouw, Gordy and the Defendant in attendance, shows that a discussion ensued concerning the addition of Bonnie VanWeelden to the county's health insurance plan. During the approximately eight-minute discussion, Lawrence Rouw stated, **"In my opinion, re-elected official would be the same as a newly elected, because your job is gone if not re-elected."**

The State contends that the video recorded Board of Supervisors' meeting is merely impeachment and/or cumulative evidence, which does not qualify as newly discovered evidence for purposes of granting a new trial. I have considered the State's cited case, *State v. Romeo*, 542 NW2d 543 (Iowa 1996) and find that *Romeo* is factually distinguishable from the present situation.

Supervisor Rouw's statement at the April 6, 2009, board of supervisors' meeting that re-elected official would be the same as newly elected official for purposes of adding dependents to the health care policy directly contradicts the many statements he made at trial to the jury to the opposite effect (and which are set out in detail in the preceding pages of this Ruling). Rouw's trial testimony was not a one-time, casual comment on this issue but was the focus of his testimony.

The DVD also establishes that there had been ongoing discussion by the supervisors for the past two to three months concerning the addition of Bonnie VanWeelden to the county's health insurance coverage, including a meeting on Friday, April 3, 2009, between Tom O'Brien, the administrator of the county's health plan, and Supervisors Gordy and Rouw.

While Gordy's statements recorded on the DVD may be considered impeaching, those statements and the other information contained on the DVD are clearly material, in that the DVD corroborates Defendant's defense to these charges.

(4) The final element is whether the newly discovered evidence would probably change the result of the trial.

The State's case on all three Counts centered on when the other two supervisors (Gordy and Rouw) became aware that Defendant sought to place his wife on the county health insurance plan and whether at least one of the two supervisors agreed to her placement on the plan.

I have closely reviewed the DVD of the April 6, 2009, Mahaska County Board of Supervisors' meeting. This video clearly establishes that:

(a) There had been ongoing discussions by the supervisors for the past two or three months concerning the addition of Bonnie VanWeelden to the county's health insurance coverage;

(b) Gordy and Rouw had met with Tom O'Brien, the county's health insurance administrator, on Friday, April 3, 2009, to discuss this issue;

(c) On the DVD Rouw unequivocally stated that "In my opinion, re-elected official would be the same as a newly elected, because your job is gone if not re-elected;

In his trial testimony Rouw also confirmed that if two of the supervisors agreed, Bonnie VanWeelden could be added to the county's health insurance coverage.

I also note that Gordy testified at trial he did not remember ever discussing this issue at the April 6, 2009, board of supervisors' meeting.

The ongoing discussions about adding Bonnie VanWeelden to the county's health insurance coverage by the supervisors initially occurred in the timeframe January 2009 through April 2009. The State's Trial Information was filed on April 22, 2011. The State has filed a Statement of Pecuniary Damages seeking more than \$120,000 restitution for health care expenses attributable to Bonnie VanWeelden from February 1, 2009, through March 1, 2012.

For purposes of ruling on this Motion, I do not need to determine whether Rouw's repeated statements in his trial testimony (that are contradicted by the information contained in the DVD) are intentionally false, whether he is attempting to protect himself from any responsibility for the large amount of health care expenses which have been paid for Bonnie VanWeelden, or if his memory of events is faulty.

The jury is entitled to hear the statements made at the April 6, 2009, board of supervisors' meeting recorded on the DVD when deciding Defendant's guilt or innocence. The jury may believe, based upon the DVD contents, that Rouw agreed in January with Defendant's position on the interpretation that re-elected means newly elected. I determine that Rouw's trial testimony lacks credibility in light of the contents of the DVD of the April 6, 2009, Mahaska County Board of Supervisors' Meeting.

The Defendant has satisfied the fourth element of his newly discovered evidence claim. I find that Defendant's Motion for a New Trial should be granted.

IT IS, THEREFORE, ORDERED that Defendant's Motion for a New Trial pursuant to Iowa Rule of Criminal Procedure 2.24(2)(b)(8) is granted. The jury's Verdicts of Guilty in Counts I, II and III are vacated and set aside, and this case will be reset for trial. A telephone pretrial conference will be held on **June 1, 2012, at 3:00 p.m.** The State of Iowa will initiate the conference call, unless agreed otherwise, with defense counsel. The Court can be reached at (319) 356-6070.

Because I have granted a new trial pursuant to Iowa Rule of Criminal Procedure 2.24(2)(b)(8), it is unnecessary to address the other issues raised by Defendant in his Motions.

Clerk to notify.

Dated: May 15, 2012.

A handwritten signature in black ink, appearing to read "Paul D. Miller", is written over a horizontal line.

PAUL D. MILLER, JUDGE
SIXTH JUDICIAL DISTRICT OF IOWA